Ganesh Raja a/l Nagaiah & Ors v NR Rubber Industries Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22NCVC-37–5 OF 2014
HASHIM HAMZAH J
31 MAY 2016

Civil Procedure — Injunction — Injunction to restrain — Plaintiff sought injunction to prevent defendants from using plaintiff's confidential information for their business to detriment of plaintiff — Whether injunction should be granted

Companies and Corporations — Directors — Breach of duty — First defendant was one of plaintiff's directors — First defendant engaged in same business as plaintiff after determination of his employment — Whether first defendant breached his duty of good faith, confidence and fidelity — Whether information confidential in nature — Whether information communicated in circumstances importing obligation of confidence — Whether there was unauthorised use of information

The plaintiff was a company carrying out the business of trading natural and synthetic rubber whereas the first defendant was one of the plaintiff's directors. During his tenure as director, the first defendant was given access to the plaintiff's official emails. As event unfolded, a few months after the determination of the first defendant's employment, a company known as GPMR Trading under the directorship of the first defendant's wife ('the second defendant') and his father-in-law ('the third defendant') had engaged in the same business as the plaintiff. Subsequently, the plaintiff brought the present action and sought an injunction order to prevent the defendants from using the plaintiff's confidential information for their business to the detriment of the plaintiff. The plaintiff alleged that the first defendant had breached his duty of good faith, confidence and fidelity by using his position, the plaintiff's confidential information and the plaintiff's trade secret for his own benefit to the detriment of the plaintiff. The issues for determination were whether the three following elements: (a) whether the information was a confidential nature; (b) whether the information was communicated in circumstances importing an obligation of confidence; and (c) whether there was an unauthorised use of the information were fulfilled.

Held, allowing the plaintiff's application with costs of RM10,000:

(1) There was not a shred of evidence produced to support the defendants' contention that the customers' information could be easily accessed online. Further, the defendants did not rebut the evidence of the plaintiff's witness ('SP1') who testified that the customers list was built by SP1 since 20 years ago and the list was saved, compiled and updated from time to time. In fact, this evidence was confirmed by the defendants' witness ('SD1'). Thus, the first element was established as such information was confidential in nature (see paras 15–17 & 21).

(2) Authorities are clear that the obligation of confidence may emanate from the relationship of the parties even in the absence of any agreement on the subject and such obligation continues even after the determination of the employment. Therefore, with or without service agreement, the first defendant still owed an obligation to the plaintiff as regards to any confidential information received in his capacity as one of the plaintiff's directors. As such, the second element was also established (see paras 27, 29 & 31–32).

(3) The first defendant did not deny that he was engaged with the same nature of the plaintiff's business and he had been dealing with the plaintiff's customers without the plaintiff's knowledge. The first defendant also did not deny instructing, via email, for commissions supposedly due to the plaintiff to be paid to either his account or the second defendant's account. Further, there was also evidence to show that the first defendant had obtained unjust enrichment by conspiring with the plaintiff's forwarder. There was also admission of liability by the first defendant via his written apologies to the plaintiff's customers and also a formal handwritten apology letter to the plaintiff for dealing with plaintiff's customers without its knowledge. Thus, in totality, the third element was established (see paras 35, 37–39 & 42–44).

(4) In cases of trade secrets and confidential information, damages will not be an adequate remedy because it is always difficult to quantify them. In the present case, the injunction sought was only to prevent the defendants from using the plaintiff's confidential information for their business to the detriment of the plaintiff and it did not in any way restrict or deprive the defendants in continuing with their business legitimately. Further, there was a real risk of future injury to the plaintiff as GPMR Trading was engaged in the same business as the plaintiff. As such, it was in the interest of justice for the court to grant both permanent and mandatory injunction sought by the plaintiff against the defendants (see paras 49–52).

[Bahasa Malaysia summary

Plaintif adalah syarikat yang menjalankan perniagaan perdagangan getah asli dan sintetik manakala defendan pertama adalah salah seorang pengarah

plaintif. Semasa memegang jawatan pengarah, defendan pertama diberi akses e-mel rasmi plaintif. Beberapa bulan selepas pemutusan perkhidmatan defendan pertama, sebuah syarikat yang dikenal sebagai GPMR Trading di mana isteri defendan pertama bertindak sebagai pengarah ('defendan kedua') dan bapa mertuanya ('defendan ketiga') telah menjalankan perniagaan yang sama dengan plaintif. Akibatnya, plaintiff memulakan tindakan ini dan memohon injunksi untuk menghalang defendan-defendan menggunakan maklumat sulit plaintif bagi perniagaan mereka hingga menjejaskan plaintif. Plaintif mendakwa bahawa defendan pertama telah melanggar kewajipannya untuk bertindak dengan suci hati, amanah dan jujur dengan menggunakan kedudukannya, maklumat sulit dan rahsia perdagangan plaintif bagi kepentingannya, menjejaskan plaintif. Isu-isu bagi pemutusan mahkamah ketiga-ketiga elemen berikut telah dipenuhi iaitu: (a) sama ada maklumat bersifat sulit; (b) sama ada maklumat disampaikan dalam hal keadaan menyampaikan kewajipan amanah; dan (c) sama ada wujud penggunaan maklumat yang tidak dibenarkan.

Diputuskan, membenarkan permohonan plaintif dengan kos RM10,000:

(1) Tidak terdapat secebis keterangan pun yang dikemukakan untuk menyokong dakwaan defendan-defendan bahawa maklumat pelanggan-pelanggan boleh diakses dengan mudah dalam talian. Selanjutnya, defendan-defendan tidak menyangkal keterangan saksi plaintif ('SP1') yang memberi keterangan bahawa senarai pelanggan-pelanggan SP1 terbentuk sejak 20 tahun lalu dan senarai tersebut disimpan, dikumpul dan dikemas kini dari masa ke semasa. Malah, keterangan ini disahkan oleh saksi defendan-defendan ('SD1'). Oleh itu, elemen pertama telah dibuktikan kerana maklumat tersebut bersifat sulit (lihat perenggan 15–17 & 21).

(2) Nas-nas jelas menunjukkan bahawa kewajipan amanah boleh timbul daripada hubungan pihak-pihak jika tiada perjanjian tentang subjek tersebut dan kewajipan tersebut berterusan walaupun selepas penamatan perkhidmatan. Oleh itu, dengan atau tanpa perjanjian pekhidmatan, defendan pertama masih mempunyai kewajipan kepada plaintif berkenaan maklumat sulit yang diterima dalam kapasitinya sebagai salah seorang pengarah plaintif. Oleh itu, elemen kedua telah dibuktikan (lihat perenggan 27, 29 & 31–32).

(3) Defendan pertama tidak menafikan bahawa dia menjalankan perniagaan yang sama sifatnya dengan plaintif dan dia telah berurusan dengan pelanggan-pelanggan plaintif tanpa pengetahuan plaintif. Defendan pertama juga tidak menafikan mengarahkan, melalui e-mel, bagi komisen yang dikatakan terhutang pada plaintif untuk dibayar kepada sama ada akaunnya atau akaun defendan kedua. Selanjutnya, tiada keterangan untuk menunjukkan bahawa defendan pertama telah

mendapat pengkayaan tidak adil dengan bersubahat dengan penghantar plaintif. Terdapat juga pengakuan liabiliti oleh defendan pertama melalui permohonan maaf bertulis kepada pelanggan-pelanggan plaintif dan juga surat rasmi permohonan maaf kepada plaintif kerana berurusan dengan pelanggan-pelanggan plaintif tanpa pengetahuannya. Oleh itu, secara keseluruhannya, elemen ketiga telah dipenuhi (lihat perenggan 35, 37–39 & 42–44).

(4) Dalam kes-kes dagangan rahsia dan maklumat sulit, pampasan bukan remedi yang cukup kerana sukar untuk menghitungnya. Dalam kes ini, injunksi dipohon sekadar untuk menghalang defendan-defendan daripada menggunakan maklumat sulit plaintif bagi tujuan perniagaannya hingga menjejaskan plaintif dan ini tidak, dalam apa-apa cara menghalang atau menafikan defendan-defendan daripada meneruskan dengan perniagaannya secara sah. Selanjutnya, terdapat risiko besar penjejasan masa hadapan kerana GPMR Trading menjalankan perniagaan yang sama dengan plaintif. Oleh itu, adalah adil bagi mahkamah membenarkan injunksi kekal dan mandatori yang dipohon oleh plaintif terhadap defendan-defendan (lihat perenggan 49–52).]

Notes

For cases on breach of duty, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 218–225.

For cases on injunction to restrain, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3923–4017.

Cases referred to

Attorney-General v Blake Jonathan Cape Ltd (third party) [1998] 2 WLR 805, CA (refd)

Certact Pte Ltd v Tang Siew Choy & Ors [1991] 4 CLJ Rep 716, HC (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, HC (refd)

Digital Plus Pty Ltd v Christopher Harris & Ors [2002] NSWSC 33, SC (refd)

Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422, HC (refd)

HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors [2005] 6 MLJ 625, HC (refd)

KFH Ijarah House (M) Sdn Bhd v Aamir Nordin bin Ariffin [2010] MLJU 450, HC (refd)

Schmidt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632, HC (refd)

Stamford College v Loi Fook Seng [1994] 2 ILR 679, IC (refd)

Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (refd)

Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6

A MLJ 810; [2016] 2 CLJ 414, CA (refd)

Legislation referred to

Contracts Act 1950 s 28
Evidence Act 1950 s 73A

B

Burhanudeen bin Abdul Wahid (Burhan & Co) for the applicants.
Chang Chen Choong (Syarikat Ng & Anuar) for the respondent.

Hashim Hamzah J:

C

BRIEF FACTS

[1] The plaintiff was at all material times a company incorporated in Malaysia with the registered address of No 24, First Floor, Jalan Kempas 1, D Taman Kempas Indah 2, 09000 Kulim, Kedah. The plaintiff was at all material times carrying out the business of trading natural and synthetic rubber.

[2] The first defendant was one of the plaintiff's directors from E 1999–2014.

[3] The first defendant, during his tenure as one of the plaintiff's directors, was entrusted with the task of managing and maintaining the plaintiff's relationship with its customers and suppliers. In addition, the first defendant F was also tasked to manage the pricing and forwarding of goods. Most of the first defendant's communications with the plaintiff's customers and suppliers were conducted via the internet and emails. The first defendant was given access to the plaintiff's official emails in carrying out his duties. In addition thereto, the first defendant had two other personal email accounts relevant in G the present case namely *adalin2012@gmail.com* and *kaneshraja@gmail.com*.

[4] GPMR Trading was established somewhere in December 2012. The second and the third defendant were partners in GPMR Trading. The second defendant is the first defendant's wife and the third defendant is the first H defendant's father-in-law.

[5] GPMR Trading was engaged in the same business as the plaintiff since March 2014, a few months after the determination of the first defendant's employment.

I

[6] In the present case, the plaintiff alleged that the first defendant had breached his duty of good faith, confidence and fidelity by using his position, the plaintiff's confidential information and the plaintiff's trade secret for his own benefit to the detriment of the plaintiff.

[7] Thus, the plaintiff claimed for the following reliefs, and I quote:

(a) Perintah injunksi untuk menghalang dan melarang Defendan Pertama daripada terus mendedah, membongkar dan menyebar rahsia perniagaan, maklumat-maklumat/data-data sulit Plaintif termasuk dan tidak terhad kepada cara operasi/mekanisme perniagaan ('trading') Plaintif, senarai nama pelanggan dan pembekal Plaintif, nombor telefon/cara hubungan pelanggan dan pembekal Plaintif, sebutan dan tawaran harga jual-beli Plaintif, sumber dan keadaan produk jual beli Plaintif serta senarai ejen penghantaran dan kos-kos terlibat kepada mana-mana pihak ketiga termasuk Defendan Kedua dan Defendan Ketiga yang berniaga di bawah nama GPMR Trading serta pekerja-pekerja dan ejen mereka;

(b) Perintah injunksi untuk menghalang dan melarang Defendan Pertama dan Defendan Kedua dan Defendan Ketiga yang berniaga di bawah nama perniagaan GPMR Trading serta pekerja-pekerja dan ejen-ejen mereka daripada berhubung dan terus berhubung, berurus niaga, pujuk rayu ('solicit'), menjalankan apa-apa transaksi jual-beli getah tulen serta barangan-barangan getah sintetik dengan pelanggan-pelanggan dan pembekal-pembekal Plaintif sepertimana yang tersenarai dalam Jadual A yang dilampirkan di sini;

(c) Perintah injunksi mandatori untuk memerintah, mengarah dan memaksa Defendan Pertama, Defendan Kedua dan Defendan Ketiga yang berniaga di bawah nama GPMR Trading dalam tempoh (7) hari dari tarikh penghakiman ini menyerah kepada Plaintif apa-apa salinan asal, salinan pendua, nota, rekod, memo, spesifikasi, data dan tulisan dalam simpanan mereka berkenaan rahsia perniagaan, maklumat-maklumat dan data-data sulit mengenai cara operasi/mekanisme perniagaan ('trading') Plaintif, senarai nama pelanggan-pelanggan dan pembekal-pembekal Plaintif, nombor telefon/cara hubungan pelanggan-pelanggan dan pembekal-pembekal Plaintif, sebutan dan tawaran harga barang jual-beli, sumber dan keadaan produk jual-beli Plaintif serta senarai ejen penghantaran dan kos-kos terlibat;

(d) Akaun keuntungan yang dijana oleh Defendan Pertama dan Defendan Kedua dan Defendan Ketiga yang berniaga di bawah nama GPMR Trading hendak dibayar kepada Plaintif;

(e) Defendan Pertama dan Defendan Kedua dan Defendan Ketiga yang berniaga di bawah nama GPMR Trading hendak dengan serta merta memulangkan kepada Plaintif semua komisyen/bayaran yang di deposit/diterima daripada ejen-ejen pengangkutan, pelanggan-pelanggan dan pembekal-pembekal dalam akaun-akaun Defendan-defendan berikut sejak dari tahun 2012 hingga tarikh penghakiman ini;

(f) Ganti rugi am yang ditaksir oleh Mahkamah yang Mulia ini;

(g) Faedah;

(h) Kos; dan

(i) Relif-relif lain yang dianggap sesuai dan munasabah oleh Mahkamah yang Mulia ini.

ISSUES TO BE TRIED

[8] A long list of issues were submitted by the parties to be determined by this court. However, after full trial, I am of the opinion that the core issues to be tried in the present case is whether the first defendant had breached his duty of good faith, confidence and fidelity towards the plaintiff. Other issues raised shall also be dealt with accordingly throughout the passage of this judgment.

[9] The matter went on full trial. One witness gave evidence for the plaintiff and two witnesses gave evidence for the defendants.

Whether the first defendant had breached his duty of good faith, confidence and fidelity towards the plaintiff

[10] It is trite law that in order to prove that the first defendant had breached his duty of good faith, confidence and fidelity towards the plaintiff, these three elements must be fulfilled, namely:

(a) that the information was of a confidential nature;

(b) that it was communicated in circumstances importing an obligation of confidence; and

(c) that there was an unauthorised use of the information.

[11] This principle was encanvassed in the case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 which was referred to in the case of *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632 (HC) and recently referred to in the case of *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810; [2016] 2 CLJ 414 (CA).

[12] In the present case, upon careful perusal of all relevant evidence presented during the course of the trial, I am of the view that the plaintiff has successfully proven that the first defendant has breached his duty of good faith, confidence and fidelity towards the plaintiff.

[13] My reasons are as follows.

Whether the information was of a confidential nature

[14] In the present case, the information that the plaintiff sought to restrain the first defendant from using or disclosing to third parties were the plaintiff's trade secret inclusive of the plaintiff's trading, the plaintiff's customers, suppliers and forwarders list together with their contact numbers, and price quotation and cost of goods.

[15] The defendants maintained that the customers' information could be easily accessed online through the Ministry of International Trade and Industry's ('MITI') websites and other websites for that matter. However, there was not a shred of evidence produced to support the defendants' contention.

[16] In addition, the defendants did not rebut the evidence of SP1 who gave evidence that the customers list was built by SP1 since 20 years ago and the list was saved, compiled and updated from time to time. In fact, SD1 himself confirmed that the list was a collection of information compiled throughout the plaintiff's business.

[17] I am of the view that such information is confidential in nature.

[18] In the case of *Schmidt Scientific Sdn Bhd v Ong Han Suan,* it was held by Kamalanathan Ratnam JC (as he then was) at p 652 that:

> No doubt that the method of configuration is not confidential but *what makes it confidential is the compilation of lists of the names and addresses of customers, specific needs and requirements of the customers and their budget and the costs and prices of the equipment obtained from the overseas principal/supplier. The defendants had saved themselves the time and trouble of having to go through laborious discussions and negotiations with the customers*, the effort put in to compile the list of names and addresses of customers and suppliers and above all the costs and prices which are only available from the overseas principal/supplier. (Emphasis added.)

[19] In *Certact Pte Ltd v Tang Siew Choy & Ors* [1991] 4 CLJ Rep 716, Chao Hick Tin J (Singapore High Court) at p 717 held as follows:

> *A list of names of suppliers and customers and the individual contracts of the plaintiffs could be trade secrets and confidential information. So could a list of prices negotiated with and quoted to various customers, contents of various agreements, records of sales, requirements of customers.*
>
> *Even if these information were in fact compiled and recorded by D1 and D2 when they were employed by the plaintiffs, they were still the property of the plaintiffs.*
>
> *An employee is not at liberty, when he leaves the employment, to take these things away in order to harm his employer or to establish his own business in competition with his former employer.* On the evidence, it was clear that the defendants had used the plaintiffs' trade secrets and confidential information for their own personal interest.

Therefore, they would continue to do so even after their employment ceased. The restraining interim injunction is therefore justified. (Emphasis added.)

[20] On a separate note, the first defendant himself confirmed the plaintiff's version that the customers list cannot be accessed by the public and is confidential.

[21] Therefore, I have no problem in holding the same. I find that the first element is established.

Whether the information was communicated in circumstances importing an obligation of confidence

[22] Most, if not all of the time, the obligation of confidence can be inferred from the nature of relationship between the parties.

[23] Balia Yusof J (now FCJ) held in the case of *KFH Ijarah House (M) Sdn Bhd v Aamir Nordin bin Ariffin* [2010] MLJU 450 (HC) that the relationship between an employer and an employee is that of a fiduciary character. Reference was also made to several authorities, namely *Stamford College v Loi Fook Seng* [1994] 2 ILR 679 (Award No 357 of 1994), *Attorney-General v Blake Jonathan Cape Ltd (third party)* [1998] 2 WLR 805 and *Digital Plus Pty Ltd v Christopher Harris & Ors* [2002] NSWSC 33.

[24] Such fiduciary relationship applies as between the directors and the company as well. *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422 (HC) is referred to.

[25] It was an undisputed fact that the first defendant was one of the plaintiff's directors from 1999–2014. It was also not disputed that as one of the plaintiff's directors, the first defendant was entrusted with the task of managing and maintaining the plaintiff's relationship with its customers and suppliers. The first defendant was also tasked to manage the pricing and forwarding of goods. Most of the first defendant's communications with the plaintiff's customers and suppliers were conducted via the internet and emails. The first defendant was given access to the plaintiff's official emails in carrying out his duties. It was also admitted by the SD1 himself that the customers list were accessible only by the directors and not by the public. The information was made available to the first defendant by virtue of his position as one of the plaintiff's directors and in the course of him carrying out his duties.

[26] However, as regards to this issue, the defendants contended that there were no contractual evidence to show that the first defendant owed any such

duties to the plaintiff either during the first defendant's employment or after the first defendant had stopped working with the plaintiff.

[27] I find that this contention is baseless. Authorities are clear that firstly, the obligation of confidence may emanate from the relationship of the parties even in the absence of any agreement on that subject.

[28] In *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* Kamalanathan Ratnam (as he then was) held at p 440 the following:

> It is my judgment that *even in the absence of an agreement, the first and second defendants owe an equitable obligation to the second plaintiff in relation to confidential information they received in their capacities as consultant and director respectively*. Lai was privy to all, if not most, of the confidential information by virtue of his position as the director (technical head) of the second plaintiff. The said information was used by the first defendant and the second defendant in the design and manufacture of the 'Stopcar' product and also by Lai with the third and fourth defendants in the marketing and the promotion of the 'Stopcar' product. I therefore find that such use by the first and second defendants amount to a breach of confidential information. (Emphasis added.)

[29] Secondly, such obligation continues even after the determination of the employment. After the employment had ceased, the first defendant should obtain the plaintiff's consent before using any confidential information acquired in the course of his employment with the plaintiff.

[30] In *Schmidt Scientific Sdn Bhd v Ong Han Suan,* Kamalanathan Ratnam JC (as he then was) at p 644 had this to say:

> I find that this duty of good faith or fidelity does not just require that the employee refrains from misuse or from disclosing information whilst still in the employment of the plaintiff. *To my mind, there is also an implied duty that prohibits the employee from using any confidential information obtained during his employment without the employer's consent for his own or someone else's use after the employment contract ends*. Thus, it is a breach of the fidelity clause and the implied duty to remove a customer list or to deliberately set out to memorise the said list with the intention of using it later, even though any use or disclosure is confined to the post-employment period. (Emphasis added.)

[31] Therefore, with or without the service agreement, the first defendant still owed an obligation to the plaintiff as regards to any confidential information received in his capacity as one of the plaintiff's directors.

[32] Thus, I find that the second element was also established.

Whether there was an unauthorised use of the information

[33] In the present case, SP1 claimed that the plaintiff had suffered losses from 2011 onwards. SP1 took drastic measures. Such measures include the examination of the plaintiff's and the first defendant's email accounts and correspondences.

[34] In the course of SP1's investigation, SP1 found that the first defendant had secretly conducted similar business, soliciting the plaintiff's customers and taking comissions without the plaintiff's knowledge. It was done mostly through the first defendant's personal email.

[35] Firstly, the first defendant did not deny that he was engaged with the same nature of the plaintiff's business and he had been dealing with the plaintiff's customers without the plaintiff's knowledge. The first defendant gave evidence as follows during cross-examination, namely:

S: Kamu boleh akses kepada email rasmi syarikat?
J: Ya.
S: Dan pada masa yang sama kamu mempunyai email peribadi yang berkomunikasi dengan pelanggan Plaintif setuju?
J: Setuju.
S: Tujuan kamu mengekalkan email peribadi untuk berkomunikasi dengan pembekal dan pembeli adalah untuk mengelak pengarah plaintif daripada tahu kandungan emel-emel tersebut setuju?
J: Tidak setuju. Untuk personal business.
S: Personal business ini adalah sama dengan perniagaan plaintif?
J: Saya hanya membuat penjualan getah sintetik.
S: Plaintif juga membuat perniagaan getah sintetik?
J: Setuju.
S: Perniagaan peribadi ini pembelian dan penjualan adalah dijalankan dengan pelanggan plaintif setuju?
J: Setuju.
S: Pada setiap masa tersebut kamu cuba menyembunyi fakta bahawa kamu menjalankan perniagaan peribadi ini daripada pengarah plaintif?
J: Setuju.

[36] The most apparent evidence on this matter can be seen in the email correspondences between the first defendant and Mr Hubert and another email correspondences between the first defendant and Ms Silvana Massolo (see pp 100, 117, 118, 132 and 133 of Bundle C). Both were the plaintiff's customers. The first defendant made it clear in these exhibits that the negotiations were made in his personal capacity.

[37] Secondly, the first defendant did not deny instructing, via email, for commissions supposedly due to the plaintiff to be paid to either the first defendant or the second defendant's personal account (see pp 147, 150, 152, 157, 158 and 166 of Bundle C). In fact, there was also evidence that a comission was paid to GPMR Trading's account by Tavorn Rubber Industry Co Ltd in which the first defendant admitted to have received the same (pp 74 and 75 of Bundle C). There were overwhelming evidence against the first defendant. In fact, the first defendant did not even deny receiving them.

[38] Thirdly, there was also evidence to show that the first defendant had obtained unjust enrichment by conspiring with the plaintiff's forwarder (pp 89 and 90 of Bundle C). The first defendant admitted to have received a portion of the differential sum between the actual price and the higher quotation price as a private commission without the plaintiff's knowledge. In short, the plaintiff was paying more for less and a portion of the difference went into the first defendant's pockets.

[39] Lastly, the plaintiff also relied on the written apologies by the first defendant to the plaintiff's customers as the first defendant's admission of liability against himself (see pp 7, 9, 24, 139 and 173 of Bundle C). The first defendant admitted to have sent all these emails.

[40] These emails were not marked with 'without prejudice' and were not even made on without prejudice basis. These emails were open letters and the first defendant was neither in dispute nor in negotiation with the recipients of those emails. Therefore I am of the view that these emails are admissible as admissions against the first defendant.

[41] In *HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors* [2005] 6 MLJ 625, Abdul Malik Ishak J (as he then was) held at pp 634–635:

> I must categorically say that this appeal was unique — *in that it did not involve any dispute as to the facts*. That being so it was certainly suitable for summary judgment and I was rather surprised that the SAR had dismissed the plaintiff's application for summary judgment in encl 5. The defendants themselves have admitted that they were and are owing to the plaintiff the sum of RM5,020,294.29. In a letter dated 28 October 1999 from the first defendant to the plaintiff, the defendants readily admitted owing to the plaintiff the sum of RM5,020,294.29 and appealed for re-structuring of the loan repayments. Again, letters from the first defendant dated 16 December 1999 and 24 December 1999 showed that the defendants admitted owing that sums. All these three letters of admissions by the first defendant were exhibited in the relevant affidavits and they were certainly damning evidence against the defendants. In the face of such solid evidence, summary judgment should have been given against the defendants in favour of the plaintiff and the appeal in encl 10

should be allowed with costs. The file should be closed forthwith bearing in mind that it was a 1999 file. But, in an attempt to write a speaking judgment, I must not stop here. I must proceed further and I have this to say.

A fact which is formally admitted ceases to be in issue. Any party who makes a formal admission and such admission is generally conclusive for purposes of the proceedings would certainly save his opponent the trouble, time and expense of proving the fact in issue. This was what had happened here. The defendants had admitted to the amount owing to the plaintiff. *I must categorically say that the three letters of admissions as to the amount owing to the plaintiff by the defendants constituted open letters or letters not based on 'without prejudice' basis. The three letters did not carry the 'without prejudice' labels and according to the case of Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257 *(FC), that the letter which was not headed 'without prejudice' was not made on the basis of without prejudice.* This meant that the defendants here had admitted to their liability and thus it would be a fit and proper case for summary judgment. The Federal Court in *Ted Bates* was also of the view that the contents of the defendant's letter in appealing for an extension of time to repay the sum should be considered as not been written or made on the basis of without prejudice. Lee Hun Hoe CJ (Borneo) who delivered the decision of the Federal Court in *Ted Bates* aptly said at p 258 of the judgment:

> The learned judge considered that that letter should have been regarded as written without prejudice. With respect, we think he is wrong. This has no application to a case where a man says he owes another a certain sum but merely asks for time to repay the sum. The letter was not even headed without prejudice. How could a letter written in such a situation be said to be written under prejudice. *The question of prejudice has no application unless a person is in dispute or negotiation with another at the time.*

This very principle was also adopted by Abdul Aziz Mohamad J (now JCA) in *Prodeal Sdn Bhd v Kelimis Jaya Sdn Bhd* [1999] 3 CLJ 409 and there his Lordship held that communication regarding a claim that was not disputed cannot be regarded as privilege. In *Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings Sdn Bhd & Ors* [1997] 1 MLJ 367, the Court of Appeal was of the opinion that the letter of admission by the defendant to the sum owed, like the facts of the present appeal, constituted a plain and obvious case for summary judgment.

In my considered view, in the context of the present appeal, it was rather obvious that the defendants have no defence on the merits against the plaintiff's claim. (Emphasis added.)

[42] There was also a formal handwritten apology letter by the first defendant to the plaintiff dated 20 September 2013 (pp 38 and 39 of Bundle C) in which the first defendant admitted to have been dealing with the plaintiff's customers and suppliers without the plaintiff's knowledge. This must also be viewed in light of the undisputed fact that the first defendant's had paid a total sum of RM92,000 to the plaintiff as a result thereto.

[43] The argument that the first defendant did so upon SP1's instruction does not hold water. He could have just ignored SP1 if he did not do anything

wrong. Thus, I am of the view that all of these factors taken in totality tentamount to an admission of liability on the part of the first defendant against the plaintiff.

[44] Overall, I find that the third element was also established.

THE DEFENDANTS' DEFENCE

[45] Despite all of the first defendant's admissions in the present case, the defendants alleged that such practice was even committed by the plaintiff's former director, SP1's wife. Therefore it was the defendants' case throughout that what the defendants did never injured the plaintiff's business.

[46] I am of the opinion that what SP1's wife did bears no bearing to the issues in the present case. As submitted by the learned counsel for the plaintiff, 'two wrongs do not make a right'. Furthermore, the plaintiff was claiming against the defendants for their wrong doing and not SP1's wife in the present case. As such, non-calling of SP1's wife by the plaintiff does not prejudice the plaintiff's claims.

[47] As regards to IDD 19 and IDD 29, the defendants should have called the maker to adduce them as evidence. The evidential burden lies on the defendants and not the plaintiff as it was the defendants who sought to introduce such facts. Since neither the maker nor the person who had knowledge of the contents of such documents were called to give evidence, IDD 19 and IDD 29 were not admissible under strict interpretation of s 73A of the Evidence Act 1950 and should not be considered.

[48] Another contention raised by the defendants was that this action by the plaintiff amounted to a restraint of the defendants' trade which was not allowed by the law. Section 28 of the Contracts Act 1950 (Revised 1974) was referred to. I see no merit in this contention. In the pleadings, the plaintiff merely sought to restraint the defendants from using the plaintiff's confidential information in the defendants' trade to the detriment of the plaintiff. The plaintiff did not seek to deny the defendants from engaging in the same nature of business.

DAMAGES

[49] In the present case, I find that it is in the interest of justice to grant both permanent and mandatory injunction sought by the plaintiff against the defendants.

[50] First and foremost, in cases of trade secrets and confidential information, damages will not be an adequate remedy because it is always difficult to quantify them (see *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297 (HC)).

[51] Secondly, the injunction sought for was only to prevent the defendants from using the plaintiff's confidential information for their business to the detriment of the plaintiff and it does not in any way restrict or deprive the defendants in continuing with their business legitimately (see *Schmidt Scientific Sdn Bhd v Ong Han Suan*).

[52] Thirdly, there were real risk of future injury to the plaintiff. It was an agreed fact that GPMR Trading was engaged in the same business as the plaintiff after the plaintiff's employment with the plaintiff had been determined. It was also admitted by the second defendant that the first defendant's role in GPMR Trading was to find customers.

CONCLUSION

[53] After careful examination of all the evidence before this court and after hearing the submissions by both parties, I find that the plaintiff had successfully proven its case on the balance of probabilities. Therefore, the plaintiff's claims are hereby allowed with costs of RM10,000. I further order that damages to be assessed by the registrar of this court.

Plaintiff's application allowed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar